

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN P. "JACK" FLYNN, et al., :

Plaintiff, :

-against- : Docket#21-cv-02587

CABLE NEWS NETWORK, INC., :

: New York, NY

Defendant.: February 21, 2023

-----: CONFERENCE

PROCEEDINGS BEFORE

THE HONORABLE SARAH L. CAVE

UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 MS. SHULLMAN: Hello. It's Deanna
2 Shullman joining for the 4:00 hearing in Flynn
3 versus CNN.

4 MS. BOLGER: And it's Kate Bolger joining
5 for the same conference.

6 THE COURT: Good afternoon. This is
7 Magistrate Judge Cave. We're here for a conference
8 in Flynn versus CNN; Case Number: 21-cv-2587.

9 May I have the appearances starting with
10 the plaintiffs, please.

11 MR. BISS: Good afternoon, Your Honor.
12 This is Steve Biss for the plaintiffs.

13 THE COURT: Okay. Good afternoon.

14 MS. BOLGER: And Katherine Bolger from
15 Davis Wright Tremaine on behalf of CNN. My
16 colleagues, Lindsey and Meena, who do all the hard
17 work in this case, are on the line listening, but
18 will not talk.

19 THE COURT: Okay.

20 MS. SHULLMAN: And this is Deanna
21 Shullman. I'm conflict counsel on one issue for
22 the defendant, CNN, this afternoon with respect to
23 Twitter information.

24 THE COURT: Okay. Thank you.

25 All right. So I have a flurry of letters

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1 from the parties about various discovery issues. I
2 would like to start, just because they came in, in
3 chronological order, with the defendant, CNN's
4 letter as to the extent to which the plaintiffs
5 have searched various social media and messaging
6 applications.

7 So, Mr. Biss, I guess one -- a few
8 clarifications from the letter that you submitted
9 in response to CNN's letter. On page 2, you say
10 that the Flynns personally searched all cell phones
11 using the search terms and produced all responsive
12 documents.

13 When the Flynns conducted that search, did
14 they search all of the apps that we're talking
15 about here, Signal, WhatsApp, Telegram, et cetera,
16 or did they just search e-mails and text messages?

17 MR. BISS: They searched the telephones
18 for text messages.

19 THE COURT: Okay. Do you know if they
20 have Signal, WhatsApp, Telegram or any other
21 messaging apps on their phones?

22 MR. BISS: We separately responded to the
23 Signal, WhatsApp and Telegram requests for
24 information, and there just is none. There is none
25 at all. And I asked them -- for instance, on the

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1 Signal, I asked them, are there -- are there
2 documents that you're going to recover if you do a
3 search -- however you do a search of Signal, if you
4 do a search of Signal? And every single one of
5 them either said, I don't have Signal, or I have
6 Signal and there are no documents.

7 We did the same thing for WhatsApp. They
8 told me that some of them used WhatsApp when they
9 went on trips abroad because apparently it saves --
10 and I don't know this for a fact, but it saves long
11 distance telephone charges. But all that is for
12 purely personal things.

13 One of them, Leslie Flynn, uses Instagram
14 to communicate with her girlfriends about tennis
15 and golf and things like that, or they use it to
16 put heart emojis on pictures of babies and things
17 like that. They have no -- there is no possible --
18 they have all assured me there's no possible use of
19 these apps to communicate regarding any matter
20 related to this case.

21 THE COURT: Okay. And when you say that
22 the Flynn's told you there were no documents on
23 Signal, do you know what they did to ascertain
24 that? Did they go to the -- look at the app or did
25 they go to a website or some other source to tell

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1 you that?

2 MR. BISS: Judge, my understanding is
3 that -- well, I know that they went to the Signal
4 app, and they went through their Signal app to see
5 if there was anything. And, of course, Signal is
6 one of these applications that auto deletes after a
7 month, and I don't think there's anything you can
8 do to change that. But they don't have -- that's
9 what they did to search Signal for anything.

10 THE COURT: Okay.

11 MR. BISS: There are no documents. Jack
12 Flynn went one extra step on Signal, and he
13 searched for the telephone number, the 910
14 telephone number that's been raised as an issue.
15 And that telephone number doesn't even show up on
16 Signal. It doesn't -- there's no hits for even
17 that number. So that's for him that he went that
18 extra step.

19 THE COURT: Okay. And then what about
20 Telegram? So, obviously, I think there's one issue
21 as to Michael Flynn's Telegram, but do any of the
22 Flynns, the other Flynns, have a Telegram account
23 that they can access?

24 MR. BISS: I think two of them do, Jack
25 Flynn and Lori Flynn. And both of them have

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1 certified -- and I would be happy to certify
2 this -- that they only use Telegram to look at
3 General Flynn's Telegram. That's what they use
4 Telegram for. They don't use it to communicate
5 with anybody. They use it to read his posts or
6 articles that he posts. And he has an active -- a
7 one active Telegram account. I think I've
8 determined that the other two are actually not his;
9 they're somebody else's, or somebody masquerading
10 as him. But they -- that's what they confirmed to
11 me specifically with regard to Telegram.

12 THE COURT: Okay. But are they able -- do
13 they have the capability of messaging on Telegram
14 or not?

15 MR. BISS: You know, I don't know the
16 answer to that question, Judge, but I could tell
17 you they told me they don't message on Telegram.

18 THE COURT: Okay.

19 MR. BISS: And there's a way to search
20 Telegram. For instance, I have searched myself. I
21 have personally searched General Flynn's Telegram
22 using all the search terms. And the -- so I think
23 there's a way you can search on Telegram, but they
24 say they don't -- Lori Flynn and Jack Flynn only
25 use Telegram to look at General Flynn's posts.

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1 That's what they use it for.

2 THE COURT: Okay. Well, if that's the
3 case, then a search should be pretty easy for them
4 to do, though. And if it is just a -- I mean,
5 maybe we can talk about a narrower set of search
6 terms to use, but it should be pretty simple if
7 that -- if the certification that you're willing to
8 make is actually true.

9 So I will -- I'm going to set that to the
10 side for a minute until we talk with CNN's counsel.
11 I just want to go through, sort of, all the issues
12 or make sure that I've gotten all the various
13 sources.

14 Okay. I think that's it for now.

15 So, Ms. Bolger, if I were to have the
16 Flynn's, Jack and Lori, do a search of Telegram, is
17 there a narrower scope of terms that we might be
18 able to focus on?

19 MS. BOLGER: I'm sure that we could narrow
20 the terms. The list we sent was broad, and I'm
21 sure I could propose a narrower set of search terms
22 for Telegram.

23 THE COURT: I mean, I'm thinking, like,
24 five to ten.

25 MS. BOLGER: Yes, I -- we could do that,

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1 Your Honor.

2 THE COURT: Okay. All right. So --

3 MS. BOLGER: May I just ask you -- may I
4 just talk to you about Signal?

5 THE COURT: Sure.

6 MS. BOLGER: Sure. I don't know if you
7 ever use Signal, Your Honor, but Signal is a, you
8 know, end-to-end encrypted app that has -- that is
9 ephemeral, but you can set the deletion. So, you
10 know, if I'm emailing my -- a reporter, they
11 sometimes send me back things on Signal that
12 disappears within 30 seconds. But if it's more
13 substantive, they can change it to, like, 30
14 minutes or an hour or a day or never disappearing.
15 So it's very much a user-generated app.

16 So in the documents produced by the
17 plaintiffs, we see an actual message in which Jack
18 Flynn, the plaintiff in this action, reaches out to
19 Lori Flynn, the plaintiff in one of the Florida
20 actions and says, Let's talk on Signal to discuss
21 the legal case, right? Which is a little
22 problematic if that was to hide the communication,
23 which I'm not saying they were, but I, kind of,
24 think I'm entitled to know that.

25 So it is the case that Jack Flynn may say,

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1 I don't have any messages on Signal. But I would
2 take the position that he had an obligation to
3 preserve the messages on Signal because they were
4 messages in anticipation of this litigation.

5 So I appreciate that there may not be
6 messages, but I -- but for both Signal and
7 WhatsApp, I think I would be entitled to know what
8 they set their messaging at. In other words, are
9 there no messages because they never moved the
10 ephemeral communication from disappears after 30
11 seconds, which they both could have done and should
12 have done for communications in anticipation of the
13 litigation.

14 And we cited that case from Arizona, Your
15 Honor, where the court talked about obligations to
16 preserve Signal.

17 THE COURT: I understand.

18 Mr. Biss, do you know what your client's
19 setting, deletion-time setting was on Signal?

20 MR. BISS: No, I don't, but I talked to
21 him about the Instagram. There is -- it was an
22 Instagram post or message that they exchanged. And
23 I asked them both independently whether or not they
24 actually used Signal to talk about it. And they
25 said, no, they used the telephone. They talked on

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1 the telephone. So they didn't use Signal at all to
2 talk about it.

3 THE COURT: Okay.

4 MR. BISS: I mean, that's the answer, and
5 that's what they would say under oath at
6 deposition.

7 THE COURT: Okay.

8 MS. BOLGER: I would only add, Your Honor,
9 that that's not what they said in the documents
10 they produced to us.

11 THE COURT: I know.

12 MS. BOLGER: And --

13 THE COURT: I have seen the excerpt, but
14 does Signal -- can you talk on Signal, like, live?

15 MS. BOLGER: Yes.

16 THE COURT: Have a live conversation on
17 Signal?

18 MS. BOLGER: Yes.

19 THE COURT: And is it recorded in writing,
20 or is it just an oral conversation, like on the
21 phone?

22 MS. BOLGER: So it is an oral
23 conversation. So what it is, is it's an end-to-end
24 encrypted conversation so that no one could access
25 what you're talking about. You can also -- if I

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1 were to call someone on Signal who didn't set their
2 messages to ephemeral, there would be a record that
3 I made the telephone call, but if there were -- if
4 they were set to ephemeral, there's no record you
5 made the telephone call.

6 THE COURT: Okay. All right. Well, do
7 you have the date scheduled for the Flynns'
8 deposition, Ms. Bolger?

9 MS. BOLGER: We do.

10 THE COURT: When will that be?

11 MS. BOLGER: They are in the coming weeks.
12 I'm sorry. I don't have the list in front of me,
13 but there are many of them over the spattering of a
14 couple weeks.

15 THE COURT: All right. Well, I think the
16 Signal issue is one for follow-up in the
17 deposition. Certainly, you can ask all these
18 questions about what their settings were and what
19 the -- you know, the text expert that's in your
20 letter from February 16th that refers to having a
21 "call on Signal." You can certainly ask about
22 that. But at least, as it's been represented here
23 today, I don't see the basis for a further search,
24 but that's obviously without prejudice to whatever
25 may come up in the deposition.

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1 But with respect to Telegram, I will order
2 Jack and Lori Flynn to do a search of Telegram
3 using the five to ten search terms that defendants
4 are going to provide.

5 And then as to WhatsApp, Ms. Bolger, do
6 you want to respond to anything on that?

7 MS. BOLGER: The same, Your Honor. My
8 concern about Mr. Biss' representation even now
9 about WhatsApp is that he is relying on his
10 client's assertion that they never use it for
11 matters associated with this lawsuit. But I
12 haven't even heard once that they searched it,
13 right, or that Mr. Biss searched it. I just -- it
14 feels like what I'm getting -- and it was very
15 helpful to have this call -- would be helpful to
16 have this call to clarify it, is what he's saying
17 is, well, he's telling me they wouldn't use it for
18 that. But I don't think that's sufficient. I
19 think he has to or, certainly, they have to
20 actually sit down and search them. And I just
21 don't have a sense of whether that's happened.

22 I will add that WhatsApp is -- also will
23 have the ability to be ephemeral, so I would want
24 to know what those requirements were as well.

25 THE COURT: Okay. Well, can we do the

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1 same? Just to verify the certification that Mr.
2 Biss has made, the same five to ten search terms
3 that we're going to use for Telegram, do the same
4 thing for Jack and Lori Flynn as to WhatsApp. And
5 if it is, in fact, the case that they dispute them
6 for anything other than what is involved in this
7 case, then it should be a pretty easy search to do.

8 Okay, Mr. Biss?

9 MR. BISS: Yeah, that's okay, Judge. And
10 I would just add one thing, Telegram is public.

11 THE COURT: Yeah.

12 MR. BISS: They can -- I mean, anybody can
13 search it, but I will run the search myself.

14 THE COURT: Okay. All right. Very good.
15 Thank you.

16 So Telegram and WhatsApp, we're going to
17 do a supplemental search on those. Okay.

18 And then, Ms. Bolger, as to your letter,
19 you know, you make some reference about messages or
20 documents that may have been deleted. I understand
21 that you're just preserving your rights on that.
22 There's nothing I need to decide today about that?

23 MS. BOLGER: No. That's right, Your
24 Honor, we are preserving our rights. So we also --
25 we included it so you didn't think we were just

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1 suspicious people. We were trying to explain to
2 you why we thought we -- why we're asking these
3 questions.

4 THE COURT: I understand. Okay.

5 So shall we turn to the plaintiffs' motion
6 to compel with respect to Anderson Cooper?

7 So, Mr. Biss, has Donie O'Sullivan's
8 deposition been taken yet?

9 MR. BISS: No, Your Honor. It is Monday,
10 the 27th.

11 THE COURT: Monday. Okay. So I assume
12 you're planning to ask him, among other things,
13 about whether he had any communications with Mr.
14 Cooper about the Flynns, right?

15 MR. BISS: Yeah, I'm going to ask him
16 about that. I mean, he -- the questions to
17 Mr. Cooper are different.

18 THE COURT: Okay. Well -- but I -- you
19 know, I think it's a -- what's changed since the
20 two prior times that I said that I didn't see any
21 connection between Mr. Cooper and the Flynns or the
22 report in this particular case?

23 MR. BISS: Well, Judge, nothing in that
24 regard has changed. The issue still is with regard
25 to CNN's position on the QAnon belief system and

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1 what is part of the QAnon belief system.

2 Judge Woods has ruled that a QAnon
3 follower means somebody who is an adherent to the
4 belief system. And the court has given some
5 examples in its August 12th order as to what
6 aspects of that belief system are.

7 Mr. Anderson -- Mr. Cooper, rather,
8 published two extensive reports in which he talked
9 about other aspects of the QAnon belief system.
10 And I want to examine him on his knowledge of what
11 the QAnon belief system consists of, in addition to
12 the idea that there is a cabal of Satan-worshipping
13 pedophiles who control the U.S. government. That's
14 apparently the central view of -- the central tenet
15 of the QAnon belief system.

16 Mr. Anderson, in his reports, has also
17 said that another significant aspect of the QAnon
18 belief system is that -- is the racist and bigotry
19 component of the QAnon belief system. And I think
20 I'm entitled to ask him as a witness, you know,
21 whether those are parts of the QAnon belief system
22 and whether there are other aspects of the QAnon
23 belief system.

24 THE COURT: Well -- but is Mr. Cooper an
25 expert in the QAnon belief system?

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1 MR. BISS: Well, he holds himself out as
2 an expert. I mean, it depends, right? He
3 certainly has more knowledge than I do about what
4 the QAnon belief system is. And he has -- he
5 represents himself to readers as an expert. That's
6 what he does. People think that he's an expert. I
7 think that he knows what he's talking about.

8 THE COURT: Well, there's probably a lot
9 of people who would represent themselves as knowing
10 a lot about the QAnon belief system, but I'm still
11 not seeing, you know, under The New York Times
12 versus Sullivan standard, which is still the
13 standard that governs this court, the state of mind
14 -- "The state of mind required for actual malice
15 has to relate to the persons in the organization
16 having responsibility for the publication."

17 And what's been -- what has not been shown
18 to me, either on the prior two occasions or today,
19 is that Mr. Cooper had any responsibility for the
20 publication that's at -- the report that's at issue
21 in this case. I'm not disputing what you're
22 representing, Mr. Biss, but I am just -- in terms
23 of the standard for taking his deposition in this
24 case, I don't believe that it has been met.

25 Ms. Bolger, do you want to say anything on

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1 that point?

2 MS. BOLGER: No, I don't, Your Honor.
3 The -- I think that's the point we're making. We
4 can make others, but that's the one that wins, I
5 think.

6 THE COURT: All right. So, Mr. Biss, I'm
7 going to deny a request -- your motion to compel
8 Mr. Cooper's deposition at this time, but as I've
9 said before, if after taking Mr. O'Sullivan's
10 deposition, or if there's some other evidence that
11 connects Mr. Cooper under The New York Times versus
12 Sullivan standard to having "responsibility for the
13 publication" at issue in this case, you can renew
14 your application. But at this time, I don't -- I
15 find that the standard for a deposition has not
16 been met. Okay.

17 Ms. Shullman, do you want to talk about
18 Twitter?

19 MS. SHULLMAN: I do. Thank you, Your
20 Honor.

21 I first want to say that I inadvertently
22 left two handles for Mary Flynn O'Neill off of my
23 letter. And I apologize for that sloppiness, but
24 Mr. Biss is aware of them as recently as February
25 15th, when I identified them in an e-mail to him.

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1 Last -- when we met in October, I had a
2 very brief appearance before Your Honor, where you
3 compelled Mr. Biss to have his clients who were
4 either parties to the Florida litigation, this
5 litigation or subpoenaed non-parties to produce and
6 provide Stored Communications Act consents.

7 Mr. Biss did that, but in transmitting
8 those consents to us, he indicated -- though he
9 supplied a consent for Valerie Flynn, one of the
10 plaintiffs in the Florida cases, he indicated that
11 Valerie Flynn actually was not associated with the
12 handle that CNN believes to be associated with her.

13 Of course, I felt compelled to disclose
14 that to Twitter. I didn't want to misrepresent
15 anything and present them what could be, really, an
16 errant SCA Consent.

17 That, among other things, sort of,
18 prompted Twitter to indicate that it will need to
19 do its own independent verification of the identity
20 of the people who hold these handles. But in the
21 process of that, Twitter has repeatedly indicated
22 to me that Mr. Biss' clients have the ability to do
23 this themselves. And I have repeatedly asked
24 Mr. Biss to do that, and he has said various things
25 from "pound sand" to "this is all I'm going to do."

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1 So, you know, I have -- I am currently
2 faced with two options; I pay Twitter, or my client
3 pays Twitter \$12,000 under Rule 45 for its cost of
4 compliance with my subpoena. Or the path of least
5 resistance to me seems to be to direct Mr. Biss to
6 follow the download procedures and actually
7 download the data for the eight handles that are
8 still at issue in this case, a feat I know he can
9 accomplish because, as Footnote 2 indicates in my
10 letter, he has done that on occasion and supplied
11 the data.

12 So I am, sort of -- that's where I am. I
13 pay 12 grand for data that Mr. Biss can get, or Mr.
14 Biss gets it.

15 THE COURT: What did Twitter say about the
16 -- sorry. If you're not speaking, please -- if
17 there's someone on this line who's not speaking,
18 please mute your line. It's difficult for us to
19 hear the participants.

20 Thank you.

21 What did Twitter say about the extent of
22 their access or their ability to access? I guess
23 I'm not sure of the technical...

24 MS. SHULLMAN: The process that Twitter
25 would use, Your Honor, is they would ping these

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1 handles, the eight handles that are still at issue,
2 and they would attempt to verify, for example, that
3 @GenFlynn is actually associated with General
4 Michael Flynn, and obtain their consent directly
5 because, given Mr. Biss' representations about
6 Valerie Flynn's account, they are not assured that
7 the consents we have supplied them actually match
8 the people who hold the accounts.

9 So they will attempt to ping them. That
10 attempt is only as good as the information in
11 Twitter's files; meaning if General Flynn has
12 supplied a fake e-mail address or phone number or
13 other contact information, they will be
14 unsuccessful -- or does not otherwise respond --

15 THE COURT: Right.

16 MS. SHULLMAN: -- they will be
17 unsuccessful in that attempt and, therefore, they
18 will not produce the information.

19 THE COURT: And when you say "ping,"
20 that's like another way of authenticating either
21 through an e-mail or sending it to the cell phone
22 that's associated with the account?

23 MS. SHULLMAN: Yes. Your Honor, I think I
24 hear shuffling, so I think I heard what you said.

25 Yes, what they are attempting to do is

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1 reach either the e-mail address or phone number
2 associated with the Twitter account they have for
3 these various handles, one or both of these pieces
4 of information. Candidly, for one of the accounts,
5 they don't have an e-mail address or a phone
6 number, but Twitter will not -- because of the
7 Stored Communications Act, Twitter will not tell me
8 which account that is.

9 THE COURT: Okay.

10 MS. SHULLMAN: So I would have to get that
11 by omission when they don't produce those records.

12 THE COURT: And the basis that you have
13 for believing that the eight Twitter handles are
14 actually for the Flynns is that you have copies --
15 seen Tweets from these handles that make you
16 think -- again, if I could just pause -- and before
17 you respond, Ms. Shullman -- if you're not speaking
18 on this call, please mute your line right now.
19 You're making it virtually impossible for me --
20 sir, please mute your line. You're making it
21 impossible for us to conduct this conference. If
22 you don't comply, we'll disconnect you from this
23 call.

24 Okay. Go ahead, Ms. Shullman.

25 MS. SHULLMAN: Sure. The only one that's

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1 actually -- that Mr. Biss disputes is associated
2 with the plaintiffs or non-parties that have been
3 subpoenaed is Valerie Flynn's, but he did provide
4 an SCA Consent to it -- for it.

5 THE COURT: Okay.

6 MS. SHULLMAN: And so that is what is --
7 so if Mr. Biss is going to do this himself, as my
8 Footnote 3 indicates, I will take, for now, his
9 representation that Ms. Flynn is not associated
10 with that handle. And I will -- we will ask Ms.
11 Flynn at her deposition in April, you know,
12 questions and, obviously, come back if we find
13 otherwise. But for now, I would accept that
14 representation if he's going to do it himself.

15 THE COURT: All right. Mr. Biss?

16 MR. BISS: Judge, obviously, I don't like
17 the insinuation from counsel that the Flynns are
18 supplying bogus telephone numbers to Twitter and
19 e-mails to Twitter. The Court may or may not have
20 a general knowledge of the fact that General Flynn
21 used Twitter and had millions of followers and used
22 it for years. And it was Twitter that adopted a
23 policy that purged all these people off the
24 platform.

25 So in the beginning, Ms. Shullman sent me

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1 a request to download all this information with
2 about a page or half of a page of instructions for
3 how to do it. We weren't happy doing work for CNN.
4 I wasn't happy about it, but we did it. And so we
5 did -- we followed the download instructions for
6 every account. We followed it to a T. And for --
7 I will use General Flynn as an example.

8 General Flynn got back a notice from
9 Twitter, an anonymous notice because Twitter is not
10 personal; they just send you anonymous notice
11 saying, we're not going to do it. And I produced
12 all -- I produced screenshots of those notices for
13 all the accounts that I was unable to download
14 information. The accounts that I was able to
15 download information for, we downloaded it and we
16 produced it to them. And I notified them for other
17 accounts that we couldn't do it because Twitter
18 wouldn't let us do it. I notified them that we
19 couldn't obtain the information; they were going to
20 have to get it from Twitter.

21 In addition to that, Your Honor ordered us
22 to sign and submit the consents, the SCA -- the
23 Stored Communications Act consents. We did that
24 for everyone. And on the Valerie Flynn one,
25 Valerie Flynn brought to my attention this wasn't

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1 her account and she was concerned. And so I
2 conveyed to Ms. Shulman that her -- Valerie's
3 concern, Ms. Flynn's concern, was that Twitter was
4 going to be accessing someone else's account
5 because somebody set up this account.

6 THE COURT: Right.

7 MR. BISS: So, needless to say, I signed
8 the consent and submitted it anyway, and --
9 feeling like that's their problem, they can deal
10 with that because Twitter can figure out
11 immediately if it's Valerie Flynn or not Valerie
12 Flynn.

13 THE COURT: Right.

14 MR. BISS: They have access under the
15 Stored Communications Act to non-content
16 information, which would be the identity of the
17 account holder, and content information, which is
18 probably what CNN is looking for.

19 We did everything, Judge, that they asked
20 us to do, every single, single thing. If there's
21 any line to be pinged, it should be this number,
22 Valerie Flynn. They have the signed Stored
23 Communications Act consents for General Flynn and
24 everybody else. Go get the -- we said, look, get
25 the -- have at the documents. You're welcome to

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1 every single thing you could look at on Twitter
2 that General Flynn or any other Flynn has ever
3 published. And guess what? None of it is ever
4 going to show that they're QAnon followers. And so
5 that's why we have no reticence whatsoever.

6 And with regard to this Valerie Flynn
7 account, ping that line. If they want to ping it
8 and see if it ever comes back, I can assure you
9 it's not going to be Valerie Flynn that says that
10 it's my account because she -- we have been over
11 this. We have been over this quite a few times.

12 THE COURT: Okay. So which were the
13 accounts or the handles that you were able to
14 download and produce, Mr. Biss?

15 MR. BISS: If Your Honor will just give me
16 one second, I can confirm that.

17 So the information that we were able to
18 download and produce was...

19 MS. SHULLMAN: Mr. Biss, I have it in
20 Footnote 2 to my letter, if you want to take a look
21 at that and see if that's correct.

22 MR. BISS: Sure. That is what I -- thank
23 you. That's what I was looking for, actually.

24 Okay. So in Footnote 2, Judge, of
25 Ms. Shullman's letter, she identifies four

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1 accounts. And it is -- there was actually five,
2 but she identifies four. The ones we produced --
3 we were able to download and produce were LoriFlynn
4 and JackFlynn1. This is -- there are two Jack
5 Flynn accounts.

6 THE COURT: Okay.

7 MR. BISS: There's GoJackFlynn, which was
8 his original Twitter. And when they canceled that
9 account, he set up another account called
10 GoJackFlynn1. So there's two GoJackFlynn's.
11 GoJackFlynn1, we were able to produce.

12 THE COURT: Okay.

13 MR. BISS: Lflynn1998, I think that's
14 Leslie Flynn. And then Joe Flynn 64, JFlynn064,
15 we produced that. And I believe we also produced
16 JosephFFlynn1. The files were massive, and so --
17 and it took me months to look at the Joe Flynn
18 accounts. But I believe it's those five accounts
19 that we produced and the others that are identified
20 in the body of page 1 of Ms. Shullman's letter.

21 We notified them we couldn't produce the
22 documents for those accounts because Twitter said
23 we can't give you the information because the
24 accounts have been closed or terminated or whatever
25 the -- whatever -- I don't have the screenshot in

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1 front of me, but words to that effect.

2 THE COURT: Okay.

3 MR. BISS: So I --

4 THE COURT: And you provided those -- you
5 said you provided those screenshots to
6 Ms. Shullman?

7 MR. BISS: I think I provided all of the
8 screenshots, but I would be happy to do that. I
9 mean, we kept screenshots for all the accounts
10 where Twitter advised us we couldn't -- they would
11 not or could not produce any information.

12 THE COURT: I see. Okay.

13 Ms. Shullman, do you have those
14 screenshots or an example of one of them?

15 MS. SHULLMAN: I do not, Your Honor. And
16 on JosephJFlynn1, as my footnote indicates, Mr.
17 Biss has represented that he has that material for
18 months, but to date, he has not produced
19 JosephJFlynn1's information.

20 The only screenshot he shared with us,
21 which he also authorized me to share with Twitter
22 during this meet-and-confer process with Twitter,
23 was one for one of Mary Flynn O'Neill's accounts.
24 That's one of the two that I left off my letter
25 accidentally.

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1 And in response to that, Twitter indicated
2 to me -- and I sent a message to Mr. Biss -- that
3 it would be willing to -- if he would be willing to
4 attempt to download their data, Twitter would be
5 willing to assist Mr. Biss in the process, should
6 he run into any problems.

7 There is one caveat. If that account --
8 rather than suspend it, if the user deactivated the
9 account, it would be impossible for Mr. Biss or
10 Twitter to download it. But Twitter tells me --
11 and, again, I don't want to resolve credibility
12 determinations between Mr. Biss' representations
13 and Twitter's because I'm not really in a position
14 to do that. But Twitter tells me none of these
15 accounts that are listed in my letter show any
16 efforts to download their data.

17 So, you know, I don't know who's telling
18 me the truth and who isn't, but I know that there
19 are eight handles for which I haven't supplied any
20 information that Twitter tells me unless the
21 account is deactivated, is available. And if it
22 was deactivated, it is a question of when because
23 these folks were subpoenaed last July. And so if
24 they deactivated their Twitter accounts after that
25 point, you know, it is possible we have a

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1 spoliation issue. But I don't know that until they
2 give me the information about when they deactivated
3 their accounts or supply the information.

4 MR. BISS: Judge, may I be heard very
5 briefly?

6 THE COURT: Yes. Go ahead.

7 MR. BISS: There's no deactivation of any
8 accounts. There's no spoliation issues at all.
9 And it is -- they haven't deactivated any accounts.
10 They've already gone through this procedure once,
11 and Twitter says they didn't go through the
12 procedure. Twitter is wrong. And I don't know
13 what the purpose would be to force us to go through
14 this procedure again when we signed the Stored
15 Communications Act consents. They have our signed
16 consents. They can just get the documents and turn
17 them over.

18 THE COURT: So what I would ask, because
19 it sounds like you have them handy, Mr. Biss, is to
20 provide the screenshots showing the attempts to
21 access the -- and download the Twitter accounts
22 that are in Ms. Shullman's letter.

23 And then, you know, I think where we are,
24 Ms. Shullman, is that you have to go back to
25 Twitter. You know, I'm taking Mr. Biss'

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1 representation about what the screenshots or what
2 the error messages say.

3 And then the other point that Ms. Shullman
4 raised, Mr. Biss, is the JosephJFlynn1 data. Is
5 that one that you have been able to download?

6 MR. BISS: I'm pretty sure it -- there are
7 two files. There are -- and I'm pretty sure one of
8 them is for JFlynn064, and the other one is for the
9 JosephFlynn1, the other account. There are two
10 massive downloaded files, and I think he downloaded
11 both of them.

12 THE COURT: Okay. So can you produce that
13 data, the JosephJFlynn1?

14 MR. BISS: I've produced it.

15 THE COURT: You did produce it?

16 MR. BISS: Yes.

17 THE COURT: Okay.

18 MS. SHULLMAN: That does not comport with
19 my understanding, Your Honor, but, you know, we
20 will double and triple check our files. I do not
21 believe we received that.

22 But, Mr. Biss, I presume, if I tell you we
23 didn't receive it, that you would just simply
24 resend it to us.

25 MR. BISS: Yes, I would be happy to do

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1 that. I will send you both files.

2 THE COURT: Great. Okay.

3 MS. SHULLMAN: And, Your Honor, with
4 respect to his screenshots that he's going to send
5 us about, you know, the failed efforts to download
6 this data, if I may have any ruling without
7 prejudice to come back because, again, I'm stuck in
8 the spot where Twitter is telling me it's going to
9 cost \$12,000 to comply, and, you know, if he sends
10 me consents that aren't as he represents them, or I
11 can -- you know, again, with the Mary Flynn one,
12 Twitter's response was, we will help Mr. Biss
13 download this data, and he just simply refused to
14 do it himself.

15 So it seems at odds that I would have to
16 pay Twitter to do it when Twitter says that the
17 error message for at least Mary Flynn was caused by
18 them doing it wrong, trying to download it wrong.

19 THE COURT: Sorry. Who is Mary Flynn in
20 the family structure?

21 MS. SHULLMAN: She is a non-party to this,
22 and she has two Twitter handles. Those are the two
23 that I, unfortunately, left off my letter. I'm not
24 actually sure what her relationship is to the other
25 Flynn's, but she is a subpoenaed non-party. She was

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1 subpoenaed for this data in July of last year.

2 THE COURT: Okay. So is Mary Flynn
3 O'Neill's Twitter one that you've tried to download
4 and gotten an error message or not?

5 MR. BISS: Yes. Yes, it is.

6 THE COURT: Okay. All right.

7 MR. BISS: And that was a screenshot
8 example that I gave. I have other screenshot
9 examples.

10 THE COURT: Okay. So if you could provide
11 to Ms. Shullman all the screenshots of the attempts
12 that you made and then the download of what you've
13 been able to get for Joseph, JFlynn1.

14 And then, yeah, Ms. Shullman, obviously,
15 it is without prejudice. I know you're doing your
16 best with negotiating with Twitter, and will -- you
17 know, I'm hoping that we can just, sort of, reserve
18 all cost-shifting now until we get to the end of
19 fact discovery. Okay?

20 MS. SHULLMAN: Okay. Thank you, Your
21 Honor.

22 THE COURT: You're welcome. All right.

23 And then, I guess, the last issue that I
24 had -- and then I will hear from the parties if
25 there's anything I missed -- was the defendant's

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1 letter regarding expert discovery.

2 So back -- I think when I saw you before
3 Thanksgiving, we had pushed fact discovery out
4 until April 17th. And I said something to the
5 effect of -- that everything else would be shifted
6 accordingly.

7 You know, we didn't specifically set those
8 dates because we were trying to get to the end of
9 that discovery, but there also seemed to be some
10 ambiguity about whether there would or would not be
11 experts.

12 So, Ms. Bolger, this -- it came up in your
13 letter. Do you want to speak to this issue?

14 MS. BOLGER: Sure. It's very
15 straightforward, Your Honor. The original Rule 26
16 report had a discovery cutoff of December 16, 2023,
17 and then an expert discovery cutoff of February 6,
18 2023. And I confess, Your Honor, at the hearing in
19 November, you said that we would move the discovery
20 deadline to April, and then you said that we would
21 move everything accordingly. And I honestly
22 thought that meant everything else and the schedule
23 would be moved accordingly.

24 We -- as you know, there's pending cases
25 in the Middle District of Florida, and expert

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1 reports are due there on March 3rd. But we asked
2 them to extend it, thinking that we would try and
3 get everything all on the same schedule. And when
4 we asked the court in the Middle District of
5 Florida to do that, Mr. Flynn told the court in the
6 Middle District that we had blown our deadline,
7 that we had already given up our right to do expert
8 reports.

9 And we just don't think did, Your Honor.
10 We think that your November order punted on other
11 dates, which it -- because we were trying to get
12 through the end of discovery. If we got it wrong,
13 gosh, it was a good-faith misunderstanding, and we
14 would ask that we have the chance to be able to
15 file expert reports. I -- there's a case on very
16 similar facts called Melendez versus Greiner, which
17 is 2003 Westlaw 22434101.

18 What we would propose, Your Honor, is not
19 long. And we would say we would do -- this is what
20 we proposed in the Middle District, and what we
21 would propose here is that we do our opening expert
22 report on April 24th. And then -- or each party
23 does their opening by April 24th, and then there's
24 a rebuttal by May 8th, and then there would just be
25 a cutoff of May 18th.

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1 THE COURT: Mr. Biss?

2 MR. BISS: So two responses, Your Honor.

3 The -- number one is they submitted the transcript,
4 I believe, as an exhibit in one of the letters. In
5 the hearing that we had on November 23, the
6 discussion was clearly about extending the deadline
7 for fact discovery, and you said "related matters."
8 And what you meant by "related matters" clearly was
9 the discovery -- the deadlines for document
10 requests, the deadline for interrogatories,
11 depositions and things like that.

12 There's no reference whatsoever in the
13 transcript to extending the expert deadline in any
14 way, shape or form. And that was February 6th.

15 We complied with your order. We
16 designated an expert, and we produced his report.
17 And the expert is on the issue of the
18 reasonableness of the attorneys' fees under the
19 Rhode Island statute. But there's no good cause
20 here at all. There's no good cause to extend the
21 deadline for an expert. And the best evidence, as
22 it were, of lack of good cause is they can't even
23 tell you what kind of expert they need. There's
24 not -- there is no identification in this case or
25 in Florida of what subject matter an expert might

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1 be tested -- might be -- on what subject matter an
2 expert would be needed. None.

3 So it's kind of, like, extending a
4 deadline without any -- you know, without
5 any showing of any need to do so. So that's why we
6 oppose the extension of an expert -- of the expert
7 deadline.

8 THE COURT: Well, I can tell you what I
9 meant when I said "we'll move everything else
10 accordingly," and that's every other date after the
11 end of fact discovery, which included expert
12 discovery and expert depositions and the, you know,
13 deadlines for summary judgment and deadlines for
14 settlement conference and everything else. That's
15 what I meant.

16 And so it -- and it also just doesn't make
17 sense to have experts before fact discovery is
18 over. That is -- there is no schedule that I have
19 ever entered since becoming a Magistrate Judge that
20 had expert discovery ending before fact discovery.

21 And so it just doesn't make sense that the
22 February 6th deadline remained in place after what
23 I said at the conference on November 23rd, which
24 was that we were -- I -- "extension of the fact
25 discovery deadline, and we'll move everything else

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1 accordingly." I said that twice. I used the
2 language "other deadlines accordingly."

3 And so that's certainly what I meant, was
4 everything coming after April -- after fact
5 discovery. So I apologize if there was any
6 confusion about that by the fact that we only -- in
7 the order that followed that conference, we only
8 adjusted the fact discovery deadline to April 17th
9 and the letter confirming its completion on April
10 24th. But -- and, you know, if you think that
11 you've been prejudiced, Mr. Biss, you can
12 certainly, you know, supplement your expert
13 reports. You know, if we are setting a new
14 deadline of April 24th, you're certainly entitled
15 to supplement your expert reports. Or if there's
16 another expert that you want to offer, there's
17 certainly no prejudice to you, I don't think, by
18 setting the schedule that Ms. Bolger described.
19 Although, you know, I'm happy to have you speak
20 to -- if you think that the schedule she proposed
21 is unreasonable, we can talk about that. But,
22 certainly, expert discovery was intended to follow
23 fact discovery.

24 Is the schedule that Ms. Bolger proposed,
25 Mr. Biss, reasonable to you, or do you want to make

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1 any changes?

2 MR. BISS: No. I think -- Your Honor,
3 again, I think the schedule is reasonable that she
4 proposed. And I would acknowledge to you
5 forthright, I can't -- I am not claiming prejudice
6 of any kind.

7 THE COURT: Okay. All right.

8 MR. BISS: So...

9 THE COURT: Okay. All right. And so
10 we're still on target to complete fact discovery by
11 April 17th?

12 Do you think that's achievable, Mr. Biss?

13 MR. BISS: Well, I do. We've got all the
14 depositions that Ms. Bolger wanted to schedule.
15 They've all been scheduled. There's dates.
16 They're all set. We took the first one today.
17 There was one issue that I would like to raise and
18 get Your Honor's guidance on it going forward on
19 that, but they've all been set. I think we can hit
20 it. I mean, that's my view.

21 THE COURT: Okay. Ms. Bolger?

22 MS. BOLGER: I -- at the moment, I don't
23 see a reason not to, but, you know, we're certainly
24 trying our level best, and we have been actually
25 working to comply with each other's schedule and

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1 have scheduled a lot of them.

2 THE COURT: Okay. Well, I think, if I'm
3 not mistaken, I have another status check-in with
4 you on March 21st. So, hopefully, we'll see that
5 we're staying on target.

6 MS. BOLGER: Okay.

7 THE COURT: So, Mr. Biss, was there --
8 there was another issue you wanted to raise?

9 MR. BISS: Yes, Your Honor, very briefly.
10 So it has to do with the depositions and -- so,
11 today, we took the deposition -- or Ms. Bolger took
12 the deposition -- I asked some questions -- of a
13 witness by the name of J.T. Wilde. And during the
14 deposition, Ms. Bolger showed him some documents
15 that had been -- not been disclosed in discovery.

16 And the -- I did broad requests for
17 production of documents. I did seven waves of
18 requests for production of documents. The
19 documents are relevant to -- or are covered by one
20 or more of those requests. And I was somewhat
21 bothered that they're using documents in a
22 deposition that they didn't produce in discovery.

23 And Ms. Bolger's position was that, well,
24 they're available on the Internet and they're not
25 in CNN's possession; therefore, I don't have to --

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1 I can just show up at a deposition and use the
2 documents.

3 I just want some guidance on that. I
4 mean, again, I feel like not only -- I feel like
5 it's a violation of the discovery responsibility to
6 produce documents and to give the opposing party a
7 fair opportunity to at least review documents
8 that -- with a potential witness that might be used
9 at a deposition. And so I just need some guidance
10 on that. If I'm wrong, I'm wrong, and that's the
11 way it goes. You know, I will be doubly sharp next
12 time.

13 THE COURT: Okay. So what was the
14 document that was shown to Mr. Wilde?

15 MR. BISS: There were --

16 MS. BOLGER: Your Honor, I -- if I can
17 tell you, they were -- the documents that were
18 shown to J.T. Wilde were documents I found in
19 preparing for the depositions that were all
20 public-facing documents off the Internet; in other
21 words, they were my work product. They were not
22 CNN's, right?

23 So, as I was telling Mr. Biss, if these
24 documents were in CNN's possession, custody and
25 control, I agree they would have been responsive

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1 and we would have produced them, but these are not
2 from there. These are my documents that I found
3 doing the research. And I think there's a case in
4 New York called the Bey versus City of New York
5 case. And what the court says there is that -- the
6 plaintiff made the argument that Mr. Biss is making
7 here, and the court disagreed, saying that when
8 documents are publicly available, then they -- then
9 you are entitled to use them if they were not
10 documents you had an obligation to produce.

11 MR. BISS: So, Your Honor, I requested in
12 discovery all documents that would show that Leslie
13 Flynn is a QAnon follower. And they didn't produce
14 any documents. And what I'm concerned about is
15 when they get to the party depositions, they're
16 going to go on the Internet on the Wayback machine
17 or somewhere on the Internet, and they're going to
18 find a document, and they're going to start
19 cross-examining her based on that document.

20 And I just think that's fundamentally
21 unfair in terms of how we prosecute these cases. I
22 mean, if they have documents, they should be
23 disclosing them in discovery because that's the
24 only way that you can prepare for a deposition;
25 otherwise, you know, they could -- you know, they

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1 could just sandbag me at the deposition with
2 documents that they find in a --

3 THE COURT: We never disclose deposition
4 exhibits to each other before a deposition unless
5 the parties otherwise agree. So you're not
6 entitled to her work product of which documents she
7 may or may not show a witness. You're right; as
8 long as they are -- if they are documents that are
9 in CNN's possession, custody or control, they need
10 to have been produced in discovery. But if it's
11 general, publicly available information, I'm
12 assuming from some Internet source or library or
13 whatever, there's nothing that requires her to
14 disclose that to you ahead of the deposition.

15 And, you know, same for you, you know.
16 You can show Mr. O'Sullivan something that you
17 found on the Internet, and you're not required to
18 show that to Ms. Bolger before his deposition, or
19 for any other CNN witness for that matter. So it's
20 fair for both of you that you're not required to
21 disclose your work product of publicly available
22 information before a deposition. So that's my
23 ruling on that issue.

24 MR. BISS: Okay.

25 THE COURT: Anything else on your side,

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1 Mr. Biss?

2 MR. BISS: No, Your Honor.

3 THE COURT: All right. Ms. Bolger?

4 MS. BOLGER: No, Your Honor.

5 THE COURT: Ms. Shullman?

6 MS. SHULLMAN: No. Thank you, Your Honor.

7 THE COURT: All right. Thank you very
8 much, everyone. We will -- you will see an order
9 from us shortly. Have a good evening.

10 MR. BISS: Thank you, Your Honor.

11 MS. BOLGER: Thank you.

12 MS. SHULLMAN: Thank you.

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C E R T I F I C A T E

I, Adrienne M. Mignano, certify that the foregoing transcript of proceedings in the case of Flynn v. Cable News Network; Docket #21-CV-02587 was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Adrienne M. Mignano
ADRIENNE M. MIGNANO, RPR

Date: February 23, 2023